



CLOSED CASE SUMMARY

ISSUED DATE: OCTOBER 4, 2020

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2019OPA-0881

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	5.125 - Social Media POL 2 – Employee Personal Use of Social Media 1. Employees Shall Not Post Speech That Negatively Impacts the Department's Ability to Serve the Public	Not Sustained (Unfounded)

This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.

EXECUTIVE SUMMARY:

The anonymous complainant alleged that the Named Employee violated SPD's social media policy when he posted a comment using his personal account referring to individuals associated with the "Antifa" movement as "cowards."

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

5.125-POL 2 – Employee Personal Use of Social Media 1. Employees Shall Not Post Speech That Negatively Impacts the Department's Ability to Serve the Public

On December 8, 2019, a Twitter user in Seattle posted a series of screen captures showing comments posted by a Seattle Police Department officer, Named Employee #1 (NE#1). The first of these comments was from a Facebook group known as "Safe Seattle." The comment, which was posted under NE#1's personal Facebook account and real name, read in its entirety: "[t]ake off your masks, cowards." Commentary by the Twitter user stated that the individuals NE#1 was referring to were individuals aligned with the "Antifa" movement. The Twitter user also stated that "[u]p until we blew his cover a few months ago, he was using a fake name and publicly liking comments about rightwing [sic] violence." A screengrab by the Twitter user showed a Facebook page with the same profile picture as NE#1's and the name "Julio Ernesto."

The Complainant attached the foregoing to an OPA complaint about NE#1. In addition, the Complainant provided additional tweets by the Twitter user showing a series of interview answers NE#1 gave in relation to a book published in 2010. There, NE#1 (quoted by name and depicted in uniform) was asked about disturbing calls he had responded to as an SPD officer. NE#1 responded that he was most disturbed by suicides. After prompting by his then-partner, NE#1 also shared an anecdote, intended by him to be humorous, about an individual in mental crisis. He related that this individual had a name which he (NE#1) had a hard time pronouncing and instead suggested to the individual that they call him "Bob" for convenience. This escalated the individual, who responded that NE#1 was



“Bob” rather than him. NE#1 was characterized as “laughing” as he related this story. OPA notes that NE#1 did not identify the individual by name or offer any description of him. In commentary on Twitter, the Twitter user characterized this interview as one in which “[NE#1] laughed at mentally ill people in crisis.”

OPA interviewed NE#1. NE#1 admitted to having operated the “Julio Ernesto” account as well as one under his true name. He said he no longer uses the “Julio Ernesto” account after having been doxed (revealed) by the Twitter user. NE#1 said that he used the “Julio Ernesto” account for a time because he had been receiving threats of violence under his true name after it was revealed by the *Seattle Times* that he shot an individual in 2009 while on duty. NE#1 said that, after the *Times* report, people were able to Google his name and find his Facebook account.

He stated that after his identity was revealed by the Twitter user, the user’s followers began contacting him aggressively over Facebook, and that he ceased using the “Julio Ernesto” account. NE#1 stated that neither the “Julio Ernesto” account nor the one under his true name identified him as an SPD officer. He stated that he had placed privacy controls on his account, had never posted photographs of himself in uniform, and that his profile listed a different employer. NE#1 claimed that he took these steps to avoid associating his personal account with SPD. To the extent that OPA was able to verify this information, OPA did not find instances in which NE#1 claimed through his social media accounts to be an SPD officer or to speak for the Department.

When asked about his comment on Safe Seattle demanding that Antifa-aligned individuals “take off your masks, cowards,” NE#1 stated that in his opinion, persons associated with the Antifa movement were guilty of assaulting police officers and damaging property. To his recollection, NE#1’s comment was in response to an article about protesters who identified themselves as aligned with Antifa concealing their identity while damaging property. NE#1 said that he would not treat anyone aligned with Antifa differently in his capacity as a police officer. When challenged as to how he could be objective while referring to Antifa supporters as “cowards,” NE#1 stated that the comment was made in his capacity as an individual and that while on duty, he takes his “oath seriously.” NE#1 stated his belief that his comment constituted protected speech under the First Amendment, and that it was “sociopolitical” opinion. NE#1 stated that the comments were made prior to the COVID-19 pandemic and did not concern mask wearing as a safety measure. OPA notes that NE#1’s disciplinary record does not include any allegation that NE#1 has acted in a manner indicating bias while on duty, including while working on demonstrations.

Finally, NE#1 described his interview comments. He stated that the comments were part of a book published in 2010. The book was approved by SPD, and SPD solicited officers including NE#1 to participate in interviews. SPD reviewed the book’s contents prior to publication.

SPD Policy 5.125-POL-2 states that SPD employees shall not post speech that negatively impacts the Department’s ability to serve the public. This policy acknowledges that SPD employees may express themselves as private citizens on social media sites as long as employees do not: make, share, or comment in support of any posting that ridicules, maligns, disparages, expresses bias, or disrespect toward any race, religion, sex, gender, sexual orientation, nationality, or any other protected class of individuals. (SPD Policy 5.125-POL-2(1).

At the outset of its findings, OPA notes that it finds some of NE#1’s comments unwise given the nature of his employment. However, the law and SPD policy draw a distinction between comments made in a personal capacity and those made in the scope of employment. Generally, a public employee’s speech about official matters is not protected by the First Amendment, and comments made in one’s capacity as an employee are subject to regulation



by a government employer in the interest of efficiency and public confidence. See *Connick v. Myers*, 461 U.S. 138, 146 (1983).

However, a public employee does not lose all speech rights merely by virtue of his employment. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). The task of an employer is to balance these two interests in a way that permits the efficient delivery of public services, while still allowing an employee to exercise his constitutional right to comment on matters of public concern as a citizen. *Id.* As relevant here, where an employee's speech concerns matters of public concern rather than his official conduct at work, and is made on his personal time merely as a citizen, the government cannot muzzle his political expression any more than it can another's. *Id.* at 574. This does not mean, however, that any comment falling within this general category would be permissible. Indeed, OPA has consistently found that comments that indicate bias or advocate for violence violate Department policy. Such cases have resulted in significant discipline up to and including termination of employment.

Here, NE#1's comment regarding cowardice was made under his personal Facebook profile, which did not identify him as an SPD officer. Though he was ultimately linked to SPD, this was not because NE#1 held himself out as an officer at the time he made his comments, but rather because individuals on Twitter were able to connect NE#1's name to the Department. Accordingly, OPA finds that NE#1 made his comments in a personal and not professional capacity. The comment concerned a matter of public concern—public safety and the relative virtue of certain protest tactics. OPA notes that, merits aside, this was and is a topic of extensive political discussion.

With regard to the substance of the comment, it was made in response to an article criticizing Antifa demonstrators assaulting a journalist, who they believed as associated with conservation counterdemonstrators. While some of the other commentors on the Safe Seattle site advocated for violence against Antifa, NE#1 did not. His statement referred to the demonstrators beating the journalist as "cowards" for not taking off their masks. He explained that he was noting his belief that the engaging in assaults and property destruction while using a mask showed a lack of courage. NE#1 did not directly identify Antifa in his comment or include any derogatory language referencing Antifa or any other political group or ideology. Given this, and while the Complainant and others might not like NE#1's comment, it does not fall within the categories of speech that OPA has previously deemed to violate policy.

As it relates to the interview NE#1 participated in, OPA similarly finds that it did not violate SPD policy. While the comments concerned an individual in evident mental crisis, the context in which NE#1 spoke suggested that the anecdote was not recounted to demean the individual or the class of people suffering from mental illness. Rather, immediately following NE#1's discussion of responding to suicides, they appeared to be a perhaps ill-advised attempt to lighten the mood of the interview. Moreover, these comments were not posted or shared by NE#1, but rather by the Twitter user from a website created by author of the 2010 book.

OPA notes that its decision here is not an endorsement of NE#1's statements. However, public employees like all citizens retain the right to hold and express views with which the majority may disagree, provided there is no evidence that those views impact the discharge of their duties. No such evidence exists here.

This case seems difficult not because the decision is close but because the views expressed may conflict with the Complainant's or even with those held by the majority of the Seattle community. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). However, it is not the purview of government to say "what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Ultimately, though some may find that they disagree with NE#1's views and be frustrated with the result



in this case, that right to disagree is protected and OPA's role cannot be to silence one personal opinion in favor of another.

For the foregoing reasons, OPA recommends that this allegation be Not Sustained – Unfounded.

Recommended Finding: **Not Sustained (Unfounded)**